IN THE MICHIGAN SUPREME COURT

Appeal from the Michigan Court of Appeals
Kelly, P.J., and Markey and Ford Hood, JJ.

In re CONTEMPT OF KELLY MICHELLE DORSEY

PEOPLE OF THE STATE OF MICHIGAN,
Petitioner-Appellee,

v

TYLER MICHAEL DORSEY,
Respondent,
and

KELLY MICHELLE DORSEY,
Respondent/Appellant.

Livingston CC Family Division:
08-012596-DL
COA: 309269
SC: 150298

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AMICI CURIAE BRIEF OF THE LEGAL SERVICES ASSOCIATION OF MICHIGAN AND THE MICHIGAN STATE PLANNING BODY

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the family court lacked subject matter jurisdiction to issue the order compelling the appellant to submit to random drug testing as part of her son's juvenile delinquency proceeding?

   Appellant answers: Yes
   Appellee answers: No
   Amici answer: Yes

2. Whether Michigan recognizes any other exceptions to application of the collateral bar rule, including (a) lack of opportunity for meaningful appellate review of the January 14, 2011 drug testing order; or (b) the appellant's irretrievable surrender of constitutional guarantees by complying with the drug testing order?

   Appellant answers: Yes
   Appellee answers: No
   Amici answer: Yes

3. Whether the appellant has properly preserved question (2) for appellate review?

   Appellant answers: Yes
   Appellee answers: No
   Amici answer: Yes

STATEMENT OF INTEREST OF *AMICI CURIAE* LEGAL SERVICES ASSOCIATION OF MICHIGAN AND THE MICHIGAN STATE PLANNING BODY

Amici curiae Legal Services Association of Michigan ("LSAM") and the Michigan State Planning Body for the Delivery of Legal Services to the Poor ("MSPB" and together with LSAM, "Amici") submit this brief to the Michigan Supreme Court in the case of *In re Contempt of Kelly Michelle Dorsey*. LSAM is a Michigan nonprofit organization incorporated in 1982. LSAM's members are thirteen of the largest civil legal services organizations in Michigan and collectively provide legal services to low-income individuals and families in more than 50,000 cases per year.[1] LSAM members have broad experience with a variety of family law cases where a low income parent's rights to custody of his or her child are at stake—these involve custody and parenting time cases, third party custody actions, minor guardianship cases, child abuse and neglect cases, paternity proceedings, and adoption proceedings. LSAM members share a deep institutional commitment to ensuring that the rights of low-income families, parents, and children are respected in these proceedings. Almost all LSAM members work daily—*e.g.*, in public benefits, family law, and housing cases—with low income families that are involved in and impacted by adoption, paternity, or similar family law proceedings. And all LSAM members are institutionally interested in and committed to providing fair and equal access to the justice system for low-income individuals.

MSPB is an unincorporated association of thirty-five individuals—leaders of the bench, the legal services community, the private bar, and community services organizations. MSPB acts as a forum for planning and coordination of the state's efforts to deliver civil and criminal

[1] LSAM's members are: the Center for Civil Justice, Elder Law of Michigan, Lakeshore Legal Aid, Legal Aid and Defender, Legal Aid of Western Michigan, Legal Services of Eastern Michigan, Legal Services of Northern Michigan, Michigan Advocacy Program, Michigan Indian Legal Services, Michigan Migrant Legal Assistance Program, Michigan Legal Services, Michigan Poverty Law Program, and the University of Michigan Clinical Law Program.

legal services to the poor. MSPB was initially created through a mandate of the Legal Services Corporation ("LSC"). Although LSC no longer requires that states have a formally designated State Planning Body, MSPB has continued to function at the request of the programs and their state funder. The stated mission of MSPB is to plan, organize, and coordinate an effective civil legal services delivery system in the State of Michigan. In addition to coordinating pro bono services, MSPB advocates on behalf of the state's indigent to the Michigan Supreme Court, Michigan Court of Appeals, the State Bar, and the State Court Administrative Office. MSPB is committed to assuring equal access for the poor to the legal system, including the family court system.

Amici have filed *amicus curiae* briefs in federal and state appellate courts. Amici use a highly selective process to determine their participation as *amici.* Selected cases are reviewed by each entity, which evaluate cases based on the consistency with their mission, the widespread impact in advancing the interests of Michigan's indigent families, the argument's foundation in existing law or a good faith extension of the law, and the reasonable prospects of prevailing.

Amici seek to advance the interests of their members and the public in guaranteeing that all parents receive the statutory and due process protections that they are owed in proceedings involving their fundamental right to voice their views and make decisions regarding the care, custody, and control of children. Amici believe that, in proceedings involving natural parents' rights, fundamental principles of due process require appellate courts to consider these rights and permit challenges based on the constitutionality of a trial court's assumption of jurisdiction regardless of when raised.

I. INTRODUCTION

The Due Process Clause of the Fourteenth Amendment of the U.S. Constitution prohibits the states from "depriv[ing] any person of life, liberty, or property, without due process of law." The U.S. Supreme Court has interpreted the Clause to "provide[] heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v Glucksberg*, 521 US 702, 720; 117 S Ct 2258; 138 L Ed 2d 772 (1997). A parent's right to the care, custody, and control of his or her children is one such fundamental right: a "natural parent's desire for and right to the companionship, care, custody, and management of his or her children is an interest far more precious than any property right." *Santosky v Kramer*, 455 US 745, 758-759; 102 S Ct 1388; 71 L Ed 2d 599 (1982). Moreover, the Constitution presumes that a child's parents are fit and that "fit parents act in the best interests of their children." *Troxel v Granville*, 530 US 57, 68; 120 S Ct 2054; 147 L Ed 2d 49 (2000).

In Michigan, the juvenile code, MCL § 712A.1 *et seq*, and Subchapter 3.900 of the Michigan Court Rules (the "Court Rules") set forth the procedures by which the state may exercise authority over minor children. *See In re Sanders*, 495 Mich 394, 404-407; 852 NW2d 524 (2014). The family court must decide in the adjudicative phase whether to take jurisdiction over the child. *Id.* at 404-406. During this phase, the court must determine whether one or more allegations in a petition of abuse and neglect is true, and, if proven, whether the allegations would bring the child within the court's protective jurisdiction. *Id.*

Second, the court must determine how to ensure the safety and well-being of the child in the dispositional phase. *Sanders*, 495 Mich at 406-407. It is only at this stage and with the protection of myriad statutory and constitutional safeguards that the court may take action that would otherwise impact the fundamental rights of a parent. *Id.* In the interests of finality, this

Court has ruled that once an order terminating parental rights is entered, the first of these two phases (the adjudication) generally cannot be collaterally attacked on appeal. *See In re Hatcher*, 443 Mich 426, 444; 505 NW2d 834 (1993).

Here, the family court never adjudicated the fitness of the Appellant Kelly Dorsey ("Appellant"), instead taking jurisdiction over her during the pendency of delinquency proceedings related to her child by way of fiat, and before her child was even adjudicated delinquent. Notwithstanding this monstrous leap and improper exercise of jurisdictional authority, the family court then ordered Appellant to submit to drug testing, and following her failure to comply with its order, found her in criminal contempt and sentenced her to 93 days in jail and imposed various costs and fines. Appellant appealed the family court's decision, specifically challenging its assumption of jurisdiction over her. The Court of Appeals affirmed the family court's judgment.

The Court of Appeals failed to recognize the family court's erroneous assumption of jurisdiction. During the juvenile delinquency proceedings, the family court never properly exercised jurisdiction over Appellant and thus this appeal is a direct—rather than collateral—attack on the family court's judgment. The Court should reverse the judgment of the Court of Appeals, overturn *Hatcher*, and remand the case to the family court for further proceedings in accordance with fundamental constitutional principles.

II. FACTUAL BACKGROUND

Amici adopt the Statement of Material Facts and Proceedings from Appellant's Application for Leave to Appeal.

III. ARGUMENT

A. The family court lacked subject matter jurisdiction to issue an order that violated Appellant's Fourth Amendment rights

This case arises out of delinquency proceedings filed against Appellant's son. In the course of those proceedings—before Appellant's son had even been adjudicated as delinquent– the probation officer for Appellant's son requested that Appellant submit to random drug testing. On January 14, 2011, the family court issued an order memorializing this request and requiring Appellant to "submit to random drug testing" as requested by the probation department. The family court issued this order without holding any hearing on whether that drug testing was "necessary for the physical, mental, or moral well-being" of Appellant's son. Moreover, Appellant, who was not the subject of the delinquency proceedings and whose rights had not been adjudicated was unrepresented by counsel at the time the order was entered.

After the drug testing order was entered, Appellant initially agreed to be drug tested but later refused so that she could seek legal advice regarding the request. The very day after the Appellant's refusal, however, the probation officer filed contempt show cause motions, which the family court promptly granted. The family court found Appellant in criminal contempt and sentenced Appellant to 93 days in jail and ordered Appellant to pay costs, fees, and fines.

Appellant moved to vacate the trial court's ruling, arguing, in part, that the family court's order requiring her to submit to drug testing violated her Fourth Amendment rights against unreasonable search and seizure and, as a result, was beyond the family court's jurisdiction and authority and was void *ab inito*. *See In re Contempt of Dorsey*, 306 Mich App 571, 579-580; 858 NW2d 84 (2013). The family court denied Appellant's motions, finding, relative to the subject matter jurisdiction issue, that "the jurisdiction of the parent is in essence obtained, in the opinion of the Court, by way of jurisdiction over the juvenile." *Id.*

On appeal, Appellant argued again that the family court's order was unconstitutional and, as a result, was beyond the family court's jurisdiction. In support of her position, Appellant cited to the factually analogous case of *Utah v Moreno*, 203 P3d 1000 (2009), where the Utah Supreme Court had overturned a similar order. Specifically, in *Moreno*, under the relevant state statute the juvenile court had subject matter jurisdiction over the parents of a juvenile under its jurisdiction but only to impose orders on those parents whose "mandates . . . are reasonable." *Moreno*, 203 P3d at 1006. In examining whether the order at issue was "reasonable" under the statute, the court held that: (1) the order must "not be aimed at punishing the parents;" and (2) "there must be some nexus between the actions of the parent that are to be constrained by the court's conditions, the behavior of the minor that led to her adjudication as delinquent, and the order imposed by the court." *Id.* at 1007. When the parents' constitutional rights are implicated, however, *Moreno* noted that there is a third requirement: "[b]ecause we must construe statutes to be constitutional whenever possible, even if an order meets the two tests for reasonableness . . . it will not be reasonable if it violates established constitutional rights of the parent." *Id*. at 1008. Based on the facts before it, *Moreno* concluded that the drug testing order in that case was unreasonable:

> We find that ordering the parent of a delinquent juvenile to undergo drug testing absent probable cause to believe that the parent is using drugs conflicts with the parent's established rights under the Fourth Amendment. In this case, no probable cause existed for the drug testing of [the father]; therefore, we find that the order is not a reasonable condition under [applicable state law].

203 P3d at 1012.

Relying on *Moreno*, Appellant requested that the Court of Appeals in this case reach the same conclusion (*e.g.* that the family court lacked subject matter jurisdiction in delinquency proceedings for her son to issue an order that violated Appellant's Fourth Amendment rights). It

did not. While the Court of Appeals did conclude that the family court's order was unconstitutional, a conclusion that this Court should also reach, the Court did not agree that the order was beyond the family court's subject matter jurisdiction, reasoning that:

> [t]he subject matter of the proceeding involved the appellant's son's juvenile proceeding. Accordingly, the family court was entitled to render orders affecting adults that were necessary for the physical, mental, or moral well-being of appellant's son.

Dorsey, 306 Mich App at 583. Essentially, the Court of Appeals concluded that pursuant to MCL § 712A.6 the subject matter jurisdiction of the family court in Michigan extends even so far as to permit the court to issue orders that violate the Constitutional rights of parents without providing those parents with even a modicum of due process. This should not be the law.

Like the Utah juvenile court, the Michigan family court is a court of limited jurisdiction. *See In re Macomber*, 436 Mich 386, 389; 461 NW2d 671 (1990). It derives its power from statutory authority. *See In re Hillier Estate*, 189 Mich App 716, 719; 473 NW2d 811 (1991). The relevant statutory authority that extends jurisdiction to the family court over adults in delinquency proceedings provides that the family court has limited jurisdiction over adults to issue orders affecting adults that the court believes are "necessary for the physical, mental, or moral well-being" of a juvenile under its jurisdiction. MCL § 712A.6. Such orders must also be "incidental to the jurisdiction of the court over the juvenile or juveniles." *Id.* Further, as this Court has previously recognized, MCL § 712A.6 cannot be interpreted so broadly as to mean that the family court has jurisdiction to deprive adults of their constitutional rights without due process. *See Sanders*, 495 Mich at 421 ("the state has a legitimate—and crucial—interest in protecting the health and safety of minor children. That interest must be balanced, however, against the fundamental rights of parents to parent their children.").

Instead, this Court has a duty to interpret statutes as constitutional whenever possible and to reject any interpretation that would render the statute unconstitutional:

> At the onset, we note that the Court of Appeals' interpretation…would seemingly grant trial courts unfettered authority to enter dispositional orders, as long as the court finds them to be in the child's best interests. This Court, however, has a duty to interpret statutes as being Constitutional whenever possible. [] Thus, if the Court of Appeals' interpretation permits trial courts to exercise their jurisdiction in a manner that impermissibly interferes with a parent's right to direct the care and custody of his or her child…we are duty-bound to reject it.

Sanders, 495 Mich at 412-413 (reversing the trial court's order and holding that the trial court exceeded its authority by issuing a dispositional review order infringing upon the father's Constitutional parental rights absent a proper adjudication of unfitness against him). Accordingly, this Court should reject any interpretation of MCL § 712A.6 that grants the family court jurisdiction to issue orders that unconstitutionally infringe on the Fourth Amendment rights of parents without due process. In other words, this Court should find that the family court lacked jurisdiction to issue the unconstitutional January 14, 2011 drug testing order.

In the same way as the father in *Sanders, supra*, was entitled to an adjudication before his Constitutional rights were infringed upon, Appellant was entitled, at a minimum, to a hearing and adjudication that random drug testing was "necessary for the physical, mental, or moral well-being" of her son before she was subjected to such an invasive process. Here, however, no hearing was held, Appellant did not even have the benefit of counsel prior to the issuance of the order, and the family court's drug testing order was otherwise unconstitutional for the reasons set forth by the Court of Appeals. Thus, the family court did not have subject matter jurisdiction over Appellant and its drug testing order is void.

Moreover, because the family court lacked jurisdiction to issue the drug testing order, it could neither obligate Appellant to comply with the order nor hold her in contempt for failing to

so comply. *See Jackson City Bank & Trust v Frederick*, 271 Mich 538, 545-546; 260 NW 908 (1935) ("When there is a want of jurisdiction over the parties, or the subject-matter, no matter what formalities may have been taken by the trial court, the action thereof is void because of its want of jurisdiction . . . They are of no more value than as though they did not exist.") 12 ALR 2d 1059, § 3 (2016) ("Subject to only one or two exceptions . . . by an almost unbroken line of authority and unanimous consensus of judicial opinion the rule may be said to be firmly established that a court does not possess the right or power to punish as for contempt a disregard or violation of its order or decree which it has rendered without jurisdiction over the subject matter or the parties or without power or authority to render the particular degree or order. Lack of such jurisdiction or power may therefore be raised by the person charged with contempt for violation of the order or decree (for the annulment or reversal of which he has taken no direct steps), in a collateral proceeding on appeal from the judgment of conviction for contempt or upon an application for habeas corpus to test the validity of the imprisonment for contempt."); 12 ALR 2d 1059 § 22 (2016) ("Where the exercise of jurisdiction by the court or judge in issuing the order or rendering the decree is regulated or limited by statute or constitution, absence of statutory or constitutional conditions deprive the court of the right to exercise jurisdiction, and in such case the violation of the order or decree rendered without jurisdiction may not be punished as for contempt.").

B. The collateral attack rule announced in *Hatcher* does not apply because this case involves a direct attack on the family court's erroneous exercise of jurisdiction

After Appellant initiated this appeal, the Court specifically requested briefing on the issue of whether the collateral attack rule announced in *In re Hatcher*, 443 Mich 426, 438; 505 NW2d 834 (1993) bars Appellant's challenge to the drug testing order in this appeal from the criminal contempt conviction. The collateral attack rule announced in this Court's opinion in *Hatcher*

does not bar Appellant's appeal. Appellant, who was never adjudicated to be an unfit parent and thus was never properly under the jurisdiction of the family court, is directly challenging the trial court's exercise of jurisdiction and never waived her right to challenge the adjudicative process. Therefore her appeal is not a collateral attack. *See In re Kanjia*, 308 Mich App 660; ___ NW2d ___; 2014 WL 7404542 (2014).

1. *Hatcher* bars only a narrow set of post-disposition appeals as collateral attacks

The parents at issue in *Hatcher*, after being fully advised of their rights, entered into valid pleas that their child should become a temporary ward of the court. *Hatcher*, 443 Mich at 430. In doing so, the parents explicitly waived their constitutional right to an adjudication trial and intentionally consented to jurisdiction over them and their child. *Id*. Thus, they abandoned their right to an adjudication trial and their right to challenge the adjudicatory process on appeal. *See People v Carines*, 460 Mich 750, 762 n 7; 597 NW2d 130 (1999) (holding that parties who intentionally relinquish a known right lose the ability to raise challenges to alleged errors on appeal). Years later, the parents tried to challenge the trial court's exercise of jurisdiction by raising a technical challenge to the sufficiency of the adjudication findings made against them.

On appeal, this Court considered the narrow issue of whether a probate court's assumption of subject matter jurisdiction over a child may be challenged by the child's parent after a termination decision and, if so, whether the entire termination proceeding could be declared void *ab initio*. *Hatcher*, 443 Mich at 428. The Court held that "the probate court's subject matter jurisdiction is established when the action is of a class that the court is authorized to adjudicate, and the claim stated in the complaint is not clearly frivolous." *Id*. at 437. "The valid exercise of the probate court's statutory jurisdiction is established by the contents of the petition after the probate judge or referee has found probable cause to believe that the allegations

contained within the petitions are true." *Id*. Completion of these proceedings allows a court to acquire jurisdiction through an adjudication hearing under MCR 3.972.

Hatcher reasoned that, although subject matter jurisdiction may be challenged at any time, the respondent in that case confused the distinction between whether the court ***has*** subject matter jurisdiction and whether the court properly exercised its discretion ***in applying*** that jurisdiction. *Hatcher*, 443 Mich at 438. The Court concluded that a genuine lack of subject matter jurisdiction may be challenged at any time, but the exercise of that jurisdiction can be challenged only on direct appeal:

> Want of jurisdiction must be distinguished from error in the exercise of jurisdiction. Where jurisdiction has once attached, mere errors or irregularities in the proceedings, however grave, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, will not render the judgment void, and until set aside it is valid and binding for all purposes and cannot be collaterally attacked. Error in the determination of questions of law or fact upon which the court's jurisdiction in the particular case depends, the court having general jurisdiction of the cause and the person, is error in the exercise of jurisdiction. Jurisdiction to make a determination is not dependent upon the correctness of the determination made.

Id. at 438-439 (citing *Frederick*, 271 Mich at 545-546). Because the respondent in *Hatcher* could have directly appealed the probate court's exercise of jurisdiction by challenging the sufficiency of the underlying petition—which was considered by the court at an adjudication hearing—he was not entitled to collaterally attack it following subsequent termination proceedings.

2. This appeal challenges whether the trial court had jurisdiction and *Hatcher* does not apply to bar it

This matter, in contrast to *Hatcher*, involves a juvenile delinquency matter, governed by rules and procedures distinct from those at issue in *Hatcher*, which related to the termination of parental rights for abuse and neglect. From the outset of this case, the family court exceeded the

narrow scope of its subject matter jurisdiction over Appellant. Indeed, the family court asserted jurisdiction over Appellant in the delinquency proceeding of her son by a sweeping declaration that "the jurisdiction over the parent is in essence obtained, in the opinion of the Court, by way of jurisdiction over the juvenile." (Mot. Hr'g Tr. 20:22-24 (Appellant's App at 12).) But, as noted above, the family court is a court of limited jurisdiction. *See Fritts v Krugh*, 354 Mich 97; 92 NW2d 604 (1958). MCL § 712A.6 explicitly limits the family court's jurisdiction over adults:

> The court has jurisdiction over adults as provided in this chapter and as provided in chapter 10A of the revised judicature act of 1961, and may make orders affecting adults as in the opinion of the court are necessary for the physical, mental, or moral well-being of a particular juvenile or juveniles under its jurisdiction. However, ***these orders shall be incidental to the jurisdiction of the court over the juvenile or juveniles***.

MCL § 712A.6 (emphasis added). The jurisdictional limits imposed by MCL § 712A.6 have been further limited by this Court:

> The court is limited in that it can only act after it has jurisdiction over a child, and it may only act to ensure a child's well-being. Any orders aimed at adults must also be incidental to the court's jurisdiction over children. In addition, under § 6, the court may only make orders affecting adults if "necessary" for the child's interest.

Macomber, 436 Mich at 398-99.

Here, unlike in *Hatcher* or similar termination proceedings, there never was an adjudication hearing as to Appellant by which the court could properly assert jurisdiction and from which Appellant could appeal. Delinquency proceedings simply do not provide this type of procedure. The only due process protections afforded here were given to Appellant's ***son***. Appellant did not have court-appointed counsel throughout the proceedings, including—crucially—when the court first entered its order requiring her to submit to drug testing. Appellant did not have the ability to appeal the family court's decision through an appeal of

right; instead, her appeal was only by application for leave to appeal. Appellant was never adjudicated unfit, and her juvenile son was only adjudicated delinquent ***two weeks after*** the trial court issued the drug testing order. Appellant's challenge is not a collateral attack on the exercise of jurisdiction but a challenge to the very existence of the family court's jurisdiction in the first instance. In short, *Hatcher* simply does not apply.

C. If the Court deems *Hatcher* applicable, *Hatcher* should be overruled or limited

Hatcher has consistently been misconstrued, to the detriment of parents—especially indigent parents—and their fundamental liberty interest in the control, custody, and care of their children. The Court should overrule or limit *Hatcher* by adopting a new standard that preserves parents' right to allege errors in an adjudication on appeal from the ultimate dispositional decision absent intentional waiver of the right to do so.

1. The Court has narrowly applied *Hatcher*

This Court has consistently narrowed *Hatcher* over the years, recognizing on numerous occasions that parents are entitled to due process protections if the state seeks to terminate their parental rights. *See, e.g.*, *In re Rood*, 483 Mich 73, 122; 763 NW2d 587 (2009) ("a parent is entitled to procedural due process if the state seeks to terminate his parental rights"); *Sanders*, 495 Mich at 422 ("due process requires a specific adjudication of a parent's unfitness before the state can infringe the constitutionally protected parent-child relationship"). Indeed, *Sanders* explained in great detail the nature of parents' fundamental liberty interest in the control, custody, and care of their children:

> A parent's right to control the custody and care of her children is not absolute, as the state has a legitimate interest in protecting 'the moral, emotional, mental, and physical welfare of the minor' and in some circumstances 'neglectful parents may be separated from their children.' *Stanley v Illinois*, 405 US 645, 652; 92 S Ct 1208; 31 L Ed 2d 551 (1972) (quotation marks and citation omitted).

> The United States Constitution, however, recognizes 'a presumption that fit parents act in the best interest of their children' and that 'there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of [fit parents] to make the best decisions concerning the rearing of [their] children.' *Troxel [v Granville*, 530 US 57, 68-69; 120 S Ct 2054; 147 L Ed 2d 49 (2000) (opinion by O'Connor, J.)]. Further, the right is so deeply rooted that '[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents . . . . *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 499 (1982).

Sanders, 495 Mich at 409.

Moreover, this Court has limited the rule announced in *Hatcher* to parents who have been found to be properly within the jurisdiction of the court who later attempt to challenge the court's adjudication on technical grounds. Most notably, in *Sanders*, the Court recognized that a parent who had never waived his right to challenge the adjudicative process must be permitted to appeal a dispositional review order terminating his parental rights based on the trial court's failure to adjudicate him. *Id.* at 422-423. In that case, the respondent mother, after being advised of her procedural rights, entered into a no contest plea agreement to the allegations in the petition. The child's father separately requested a trial on the allegations against him. The trial court applied the one-parent doctrine, adjudicated the children as neglected, ordered the children into foster care, and required the father to comply with services based on the mother's plea. At a subsequent dispositional review hearing, the father filed a motion challenging the court's authority to remove the children from his care and ordering him to comply with services, since he had never been adjudicated unfit. The court denied his request and the Court of Appeals denied the father's application for leave to appeal.

This Court reversed the trial court's order and held that the trial court exceeded its authority by issuing a dispositional review order infringing upon the father's constitutional rights

absent a proper adjudication of unfitness against him. Significantly***, the Court issued this ruling despite the fact that the father had not appealed the initial dispositional order***. Thus, the Court limited application of *Hatcher*'s collateral attack rule to adjudicated parents who are extensively advised of their procedural rights during termination proceedings and did not apply the rule to an unadjudicated parent who never had the opportunity to properly waive his right to an adjudication trial.

Similarly, in *In re Mays*, 490 Mich 993; 807 NW2d 307 (2012), this Court reversed an order terminating the parental rights of an unadjudicated father. At issue in *Mays* was the constitutionality of the one-parent doctrine, which, although unaddressed in *Mays*, was later deemed unconstitutional in *Sanders*. Nonetheless, the Court explicitly noted that the unadjudicated father in *Mays* retained his right to challenge the constitutionality of the one-parent doctrine on remand in the trial court. *Id*. at 994 n 1. By the time *Mays* reached this Court, the case was well beyond the initial disposition hearing, after which the unadjudicated father had not filed an appeal as of right. Yet, the Court again preserved the right of an unadjudicated parent to challenge the validity of an underlying dispositional review order that infringed upon his parental rights based on the trial court's failure to adjudicate him as an unfit parent. If *Hatcher* had been strictly applied, this result would not have been possible.

This Court's holdings in *Rood*, *Mays*, and *Sanders* represent the consistent limiting of *Hatcher*. Despite these admonitions, the Court of Appeals frequently misinterprets *Hatcher* and bars legitimate challenges to trial court jurisdiction as "collateral attacks." *See, e.g.*, *In re Wangler*, 305 Mich App 438; 853 NW2d 402 (2014); *In re Jones*, No. 326252 (unpublished per curiam opinion of the Court of Appeals) (October 27, 2015). As a result, parents, like Appellant in this case, are consistently prevented from raising on appeal fundamental errors in the

adjudicatory process and, as a result, suffer serious consequences: for example, the loss of the rights of custody, control, and care of their child, or as is the case here, imprisonment. To prevent further unconstitutional infringement on parental rights, to eliminate lingering confusion of the bench and bar, and to prevent disparate application of Michigan law, the Court should renouncing *Hatcher* once and for all.

2. *Hatcher* should be replaced by a rule which adequately protects the Constitutional rights of parents

Amici propose the following rule of law to replace *Hatcher*: a party to a termination of parental rights proceeding may allege errors in the adjudication on appeal from the ultimate dispositional decision in the termination of parental rights proceeding absent intentional waiver of the right to do so. Amici believe that such a rule serves three key purposes. First, it adequately protects the fundamental constitutional rights of parents to the care, custody, and control of children. The U.S. Constitution, through the Due Process Clauses of the Fifth and Fourteenth Amendments, protects a parent's fundamental right to custody of his or her children. The U.S. Supreme Court has held that a "natural parent's desire for and right to the companionship, care, custody, and management of his or her children is an interest far more precious than any property right." *Santosky v Kramer*, 455 US 745, 758-759; 102 S Ct 1388; 71 L Ed 2d 599 (1982). Moreover, the Constitution presumes that a child's parents are fit and that "fit parents act in the best interests of their children." *Troxel*, 530 US at 68. This liberty interest "is perhaps the oldest of the fundamental liberty interests recognized by this Court," *Id.*, at 65 (O'CONNOR, J.) (plurality opinion), and "is an interest far more precious than any property right." *Santosky*, 455 US at 745.

Applying these fundamental principles and striking down the one-parent doctrine in *Sanders*, this Court recognized that a parent who had never waived his right to challenge the

adjudicative process must be permitted to appeal a dispositional review order terminating his parental rights based on the trial court's failure to adjudicate him. *Sanders*, 495 Mich at 422-423. The *Hatcher* rule stands in conflict to *Sanders*—and these fundamental principles more broadly. Amici's proposed rule assures all parents will receive the due process protections outlined in *Sanders*.

Second, Amici's proposed rule provides much needed clarity to litigations, trial courts, and appellate courts alike. *Compare Sanders*, *supra*, *with In re Wangler*, *supra*. Absent a clear statement abdicating *Hatcher*, it will likely continue to be misapplied.

Third, Amici's proposed rule preserves the finality of decisions in family law proceedings by continuing to bar true collateral attacks, in other word, attacks on jurisdiction raised in completely separate proceedings. *See Frederick*, 271 Mich at 545-546.

Such a rule does not radically reshape the judicial landscape; rather it reaffirms and clarifies the standard as it has been applied since the Court first decided *Hatcher*. In *Hatcher*, the parents waived any right to challenge the adjudicatory process by pleading to jurisdiction and failing to raise any challenges on appeal to the plea-taking process. *See Hatcher*, *supra*. By contrast, in cases where the parent or parents did not affirmatively waive the right to challenge an adjudication, as is the case here, the Court has allowed subsequent challenges to proceed even though the parent did not raise the issue until after the dispositional or termination decision.

In *Sanders*, the trial court adjudicated the father unfit based on the one-parent doctrine, despite his requests for a separate adjudication trial; the Court allowed his challenge to proceed—and overturned the one-parent doctrine as unconstitutional—even though the father appealed after the dispositional phase. *Sanders*, *supra*. In *In re Hudson*, 483 Mich 928; 763 NW2d 618 (2009), and *In re Mitchell*, 485 Mich 922; 773 NW2d 663 (2009), the Court even

reversed ***termination*** decisions on the grounds that the parents were inadequately advised of the rights they were waiving in pleading to ***jurisdiction***. And in *In re Mays*, *supra*, the Court reversed a termination decision and noted that the father had the right to challenge the trial court's failure to adjudicate him. *Id.* at 994, n1. *Hatcher* did not bar those challenges; it should not bar Appellant's challenge here.

IV. CONCLUSION

For the foregoing reasons, Amici respectfully request that the Court reverse the judgment of the Court of Appeals, overrule *Hatcher*, and remand this case for further proceedings in accordance with fundamental constitutional principles.

Respectfully Submitted,

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